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State's Brief in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict & Motion for a New Trial

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Cuyahoga County Prosecutor

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2000 MAY -8 14:53

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CLERK OF COURT
CUYAHOGA COUNTY

2000 MAY -8 14:53

CLERK OF COURT
CUYAHOGA COUNTY

Charles Murray, Administrator,
Plaintiff

vs

State of Ohio,

Defendant.

Case No. 312322

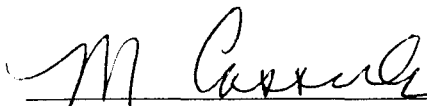
Judge: Suster

BRIEF IN OPPOSITION

Defendant, by and through counsel, William D. Mason, Cuyahoga County
Prosecutor, and Marilyn B. Cassidy, Assistant Prosecutor, submit herewith the State's
Brief in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict, and
Motion for a New Trial. The State of Ohio respectfully requests, for all of the reasons set
forth in its brief, that Plaintiff's Motions be denied.

Respectfully Submitted,

WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR


Marilyn B. Cassidy (0014647)
Assistant Prosecutor
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INTRODUCTION

Plaintiff has filed a motion alternatively seeking a Judgment Notwithstanding the Verdict (JNOV) or New Trial. Plaintiff avers in his motion that this court erred in allowing this case to be heard by a jury and in admitting evidence that showed Dr. Samuel Sheppard was in a strained relationship with his wife. Furthermore, plaintiff alleges the jury was incapable of performing its function because it did not reach a verdict in plaintiff's favor and was unduly influenced by the State.

Plaintiff's arguments are without legal foundation and amount to no more than a second-guessing of this court's prior rulings. As set forth below, the case was properly tried and a just conclusion reached. Plaintiff was afforded a full and fair opportunity to present its case. The jury rejected the claim based upon the evidence presented. Plaintiff is entitled to no more. Accordingly, the Motion for JNOV or New Trial should be summarily rejected.

JUDGMENT NOTWITHSTANDING THE VERDICT CAN ONLY BE GRANTED WHERE REASONABLE MINDS CAN COME BUT TO ONE CONCLUSION, AND THAT CONCLUSION IS ADVERSE TO THE NONMOVING PARTY; WHERE REASONABLE MINDS COULD CONCLUDE DIFFERENTLY, THE MOTION MUST BE DENIED

“The test to be applied by the trial court in ruling on a motion for judgment notwithstanding the verdict (JNOV) is the same test applied on motion for directed verdict; evidence adduced at trial and facts established by admissions in pleadings and in record must be considered most strongly in favor of nonmovant, and if there is substantial evidence to support nonmovant's side of case, upon which reasonable minds might differ,

motion must be denied* * * .“ *Davis v. Cincinnati, Inc.* (1991), 81 Ohio App.3d 116, (9th Dist.). See also *Vance v. Consol. Rail Corp.*(1995), 73 Ohio St.3d 222; *Airborne Express v. Sys. Research Laboratories, Inc.* (1995), 106 Ohio App.3d 498; *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39 (JNOV denied where evidence conflicts on a material issue).

In ruling on a motion for judgment notwithstanding the verdict, the court is not concerned with weight or credibility of witnesses. *Davis, supra*. The trial judge does not determine the weight of the evidence or the credibility of the witnesses, and although he examines the materiality of the evidence, he does not look at the conclusions to be drawn. *Cardinal v. Family Foot Care Centers, Inc.* (1987), 40 Ohio App.3d 181.

The State of Ohio presented overwhelming evidence that Sam Sheppard committed the murder of his wife, Marilyn Sheppard. To specify only some of the evidence, there is the testimony of Sam Sheppard, Bay Village policeman Fred Drenkhan, Cleveland detectives Shottke , Gareau, and Pagel. Furthermore, Dr. Bailey, a friend of Marilyn and Sam Sheppard, testified that Mrs. Sheppard was furious upon learning of a letter sent to Dr. Sheppard by Miss Susan Hayes and threatened divorce shortly before her death. Coroner, Dr. Elizabeth Balraj testified to the blunt trauma injuries sustained by Marilyn Sheppard, autopsy protocol and cause of death. Experts Toby Wolson, Dr. Robert White, and Greg McCrary provided testimony analyzing blood spatter, lack of injuries to Dr. Sheppard, and crime classification as staged domestic homicide, respectively. Dr. Tom Holland, forensic anthropologist, testified that the blunt trauma injuries inflicted upon Mrs. Sheppard were in the nature of low speed air or high speed automotive impact and that death occurred quickly. Dr. Philip Bouffard testified

that the handwriting in a book authored by Sam Sheppard and the inscription “yes” below the text, “Did Sam do it?” was the writing of Sam Sheppard.

There exists abundant, substantial, evidence in support of the theory that Sam Sheppard is not innocent of the murder of his wife, Marilyn Sheppard. Clearly, reasonable minds could reach that conclusion. Thus, under Ohio Civil Rule 50 (B) and case authorities, plaintiff’s motion JNOV must be denied.

**A MOTION FOR A NEW TRIAL MAY NOT BE GRANTED WHERE THE
VERDICT IS SUPPORTED BY COMPETENT, SUBSTANTIAL AND
APPARENTLY CREDIBLE EVIDENCE.**

A motion for new trial upon the basis that the judgment is not sustained by sufficient evidence will not be granted where the verdict is supported by competent, substantial, and credible evidence. In *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, the court stated:

“Where there is a motion for a new trial upon the ground that the judgment is not sustained by sufficient evidence, a duty devolves upon the trial court to review the evidence adduced during the trial and to itself pass upon the credibility of the witnesses and the evidence in general. It is true that, in the first instance, it is the function of the jury to weight the evidence, and the court may not usurp this function, but, when the court is considering a motion for a new trial upon the sufficiency of the evidence, it must then weigh the evidence. A court may not set aside a verdict upon the weight of the evidence upon a mere difference of opinion between the court and jury.” *Vernon*, citing *Poske v. Mergl* (1959), 169 Ohio St. 70 at 73,74.

“In deciding whether to grant a new trial the judge has often been referred to as the thirteenth juror.* * * While this does not mean that the judge may substitute his own judgment for that of the trier of fact, it does require the judge to ‘view the verdict in the

overall setting of the trial: * * *and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result’’. *Eagle Am. Ins. Co. v. Frencho* (1996), 11 Ohio App.3d 213.

“In a civil context, it is well established that where an appellant challenges a trial court’s judgment in a civil action as being against the weight of the evidence, the function of the appellate court is limited to an examination of the record to determine if there is any competent, credible evidence to support the underlying judgment. If competent, credible evidence is present a reviewing court will not reverse the trial court’s judgment. *Doss v. Smith* (June 25, 1998), Cuyahoga App. No. 72672, unreported. See also, *Zurowski v. Giannini* (June 25, 1998), Cuyahoga App. No. 72704, unreported.

It is significant, also, that a jury is not required to give any additional weight to the opinion of an expert, if any weight at all. Rather, an expert’s opinion is admissible, as is any other testimony, to aid the trier of fact in arriving at a correct determination of the issues being litigated. Expert testimony is permitted to supplement the decision-making process of the ‘fact-finder’ not to supplant it. *Ragone v. Vitali & Betrami, Jr. Inc.* (1975), 42 Ohio St.2d 161.

“The jury system has its roots in our Constitutions, both federal and state, and is fundamental to our democratic form of government, therefore, a jury verdict cannot be set aside lightly by conclusory statements of the trial judge not grounded in the evidence * * * It is axiomatic that the trial court cannot simply substitute its opinion for that of a jury.” *Karnavas, et. al. v. Lakewood Hospital Association, et. al* (March 15, 1997), Cuyahoga App. No. 70685, unreported.

There is ample evidence in the record to support the jury's verdict for defendant, State of Ohio. The fact that plaintiff disagrees with the jury's verdict is not grounds for a new trial. There is absolutely no evidence that the jury reached a clearly erroneous verdict. Moreover, contrary to plaintiff's position that the scientific evidence overwhelmingly demonstrates that Sheppard could not have committed the murder of his wife, the jury is not required to give any weight to testimony presented by experts. In view of the foregoing, plaintiff's motion for a new trial should be denied.

**A SHORT PERIOD OF DELIBERATION BEFORE THE JURY REACHES
VERDICT IS NOT GROUNDS FOR A NEW TRIAL.**

A short period of deliberation by a jury before returning a verdict does not establish the proposition that the jury did not properly perform its duties * * * The short period of deliberation in such cases may indicate only that the members of the jury felt that the evidence was overwhelming in favor of the party receiving the verdict. *Segars v. Atlantic Coast Line Railroad Company* (1961), 286 F.2d 767 (motion for new trial denied, four minute jury deliberation).

There is no prescribed length of time for which a jury must deliberate. In denying a motion for a new trial that alleged jury misconduct because the jury deliberated twenty-one minutes before reaching a verdict, the Second District Court of Appeals opined:

“There is no statutory provision prescribing the length of time a jury shall deliberate before reaching a verdict. While the verdict should be the result of sound judgment, dispassionate consideration, and conscientious reflection, and the jury should, if necessary, deliberate patiently and long on the issues which have been submitted to them, yet where the law does not positively prescribe the length of time a jury shall consider their verdict, **they may render a valid verdict without retiring, or on very brief deliberation after retiring,** although the trial court may in

its discretion cause the jury to reconsider the case if their decision is so hasty as to indicate a flippant disregard of their duties.” *Val Decker Packing Co. v. Treon* (1950), 88 Ohio App. 479. (emphasis added.)

The amount of time a jury spends in deliberations is not indicative of its consideration of the evidence* * * [A] brief deliberation time does not suggest juror misconduct. *State v. Lent* (1997), 123 Ohio App.3d 149, (forty minute guilty verdict, felonious assault charge).

A unanimous verdict for the defendant in approximately two and a half hours demonstrates that the State’s evidence was compelling, if not over-whelming. The jury in this case properly performed an extraordinary task. They spent ten weeks in Court Room 20 B, away from their jobs and families. They endured the same ten weeks of trial that the parties and the court endured, including numerous witnesses and volumes of exhibits. The jurors were attentive. The jurors took notes. Plaintiff’s assertion that this jury failed to take seriously its role, or somehow, just didn’t “get it” after a ten week digressive process offends the dignity of not just the individual jurors and the jury as a panel, but of counsel and the court as well.

THERE IS NO EVIDENCE ALIUNDE OF JUROR MISCONDUCT, NOR WAS THERE PROSECUTORIAL MISCONDUCT; PLAINTIFF HAS PROVED NO PREJUDICE AND THE MOTION FOR NEW TRIAL MUST BE DENIED.

A. Juror Misconduct

In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror. *State v. Phillips* (1995), 74 Ohio St.3d 72. Additionally, Ohio courts have a long-standing rule “not to reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown.” [citations omitted.] “[J]uror

misconduct must materially affect * * * substantial rights to justify a new trial * * * . [A] party complaining about juror misconduct must prove prejudice.” *Id.* In *State v. Sheppard* (1998), 84 Ohio St.3d 230, a criminal defendant was denied a new trial where, after the verdict, counsel learned that a juror admitted contacting a psychologist for a definition of “paranoid schizophrenic.” The trial court determined that appellant suffered no harm or prejudice as a result of the juror’s brief conversation with the psychologist. “A court may determine that a juror’s impartiality has remained unaffected based upon that juror’s testimony. *Smith v. Phillips*, 455 U.S. at 215, 102 S.Ct. at 945, 71 L.Ed.2d at 85.” *Id.* at 233.

Plaintiff cites juror number 2’s request to be excused early in the trial, and one juror’s report to the court of another juror’s expression that she may have formed an opinion before the case was submitted. In each instance, the court fully and fairly investigated the situation. In the first instance, the juror in question was excused. In the second, the court *voir dired* the panel relative to the comment made by a juror. The court in its discretion determined that the jurors’ impartiality remained unaffected, and that no prejudice was suffered by plaintiff. Each case of alleged misconduct was addressed properly by the court and no new trial should be granted on that basis.

Plaintiff’s reference to “undue influence” and jury misconduct does not extend factually beyond the two incidents discussed above. It is significant, however, that after entry of verdict, a charge of jury misconduct may not arise solely on juror’s statement after deliberations, but instead, there must be some competent, credible evidence *aliunde*, that is, extraneous, independent evidence from some other source. *Crawford v. Sylvania Marketplace Co.* (1995), 72 Ohio Misc.2d 3, See also *Tasin v. Sifco Industries, Inc.*

(1990), 50 Ohio St.3d 102; Evid. R. 606 (B). The *aliunde* principle protects the privacy of a jury's deliberations from inquiry and promotes the finality of jury verdicts. *State v. Mason, supra*, at 167.

B. Prosecutorial Misconduct

Counsel is generally afforded wide latitude in addressing the jury during opening statements and closing arguments. *State v. Lent* (1997), 123 Ohio App.3d 140, *State v. Maurer* (1984), 15 Ohio St.3d 239. Failure of counsel to object to the alleged misconduct during trial constitutes a waiver of any error associated with the alleged misconduct. *Jones v. Olcese* (1991), 75 Ohio App.3d 34, (new trial denied where counsel's remarks supported by evidence). "Except where counsel, in his opening statement and closing argument to the jury, grossly and persistently abuses his privilege, the trial court is not required to intervene *sua sponte* to admonish counsel and take curative action... Unless the record clearly demonstrates that counsel's argument was highly improper and inflamed the jury, [the] * * * court will not disturb the exercise of the trial court's discretion. Even where the remarks are found to be improper, there must be clear evidence that the jury's verdict is the product of passion and prejudice. "*Jones, supra*, [citations omitted.]

Plaintiff makes scattered references to prosecutorial misconduct through out his brief. The principle bases for plaintiff's position seem to be that the prosecutor made reference to evidence of Sam Sheppard's extramarital affair(s) and identified instances which illustrate Sheppard's utter disrespect for Mrs. Marilyn Sheppard. In addition plaintiff argues that remarks made by Prosecutor Mason to the media concerning settlement amount to "undue influence."

With regard to the question of marital strain as motive, the parties fully briefed and argued those evidentiary issues to the court . As a result, the court allowed the State of Ohio to present certain evidence relative to marital strain. It is completely proper for the prosecutor to comment on that evidence as a part of his closing statement.

The prosecutor's remarks were firmly rooted in the evidence presented to the jury. The term "playboy of the western world" originated from witness Mims Adler, a close friend of the Sheppards', not with the prosecutor. The jury heard from Susan Hayes, who testified to having had a sexual affair with Dr. Sheppard. In addition, Dr. Bailey testified that Mrs. Sheppard was emotional, angry, and threatened divorce when speaking to him and Mrs. Bailey at a birthday party. This information came from witnesses, not from the prosecutor. Inasmuch as the prosecutor's remarks are well grounded in the evidence, the remarks are proper, and no new trial should be granted.

Prosecutor Mason's remarks to the media concerning a settlement offer were not improper and do not form a basis for a new trial. There was no gag order issued by the court. Moreover, the Code of Professional Responsibility, DR7-107(C) provides that "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. At the time Prosecutor Mason made a public statement concerning settlement negotiations, he was in complete compliance with DR7-107. Moreover, he was obligated to respond to the inaccuracies promulgated by Mr. Gilbert to protect the interest of his client, the People of the State of Ohio. Finally, the court fully investigated by speaking with jurors and, within the court's discretion determined that no

juror's impartiality had been affected. Accordingly, there are no grounds for a new trial on the basis of Mr. Mason's public remarks relative to settlement.

THE TRIAL COURT'S RULING THAT DEFENDANT HAS A RIGHT TO TRIAL BY JURY IS CORRECT, AND EVEN IF INCORRECT IS NOT PREJUDICIAL TO PLAINTIFF AND IS NOT GROUNDS FOR A NEW TRIAL

A trial court may grant a new trial when it finds that it committed an error of law during the trial. Civ.R.59(A)(9). However, the trial court does not exercise discretion in making such a ruling. Consequently, the appellate court will reverse the new trial order when the challenged action was not error or was not prejudicial. *Sanders et al. v. Mt. Sinai Hospital, et al.* (1985), 21 Ohio App.3d 249. Where a new trial is granted by a trial court for reasons which involve no exercise of discretion, but only a decision as to a question of law, the order granting a new trial may be reversed on the basis of a showing that the decision was erroneous as a matter of law. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82. In order to merit a new trial, appellant has the burden to demonstrate prejudice. *Malloy v. City of Cleveland* (Mar. 4, 1999), Cuyahoga App. No. 73789, unreported. See also, *Flint v. Ace Doran Hauling & Rigging Co., et al.* (June 30, 1999), Portage App. No. 97-P-0166, unreported.

Article 1, Section 5 of the Ohio Constitution guarantees the right to a jury trial in actions existing at common law before the Ohio Constitution was enacted. False imprisonment was a tort at common law. With regard to wrongful imprisonment, R.C. 2743.02 and R.C. 2743.48 and relevant case law provide that the state waived its immunity from liability and consented to be sued in accordance with the same rules of law applicable to suits between private parties. See *Smith v. Wait* (1975), 46 Ohio

App.2d 281, 283. The Ohio Supreme Court has specifically stated that "R.C. 2743.48 does not replace the false imprisonment tort, but, rather, supplements it to allow a recovery in some cases where recovery was not available before." *Bennett v. Ohio Dept. of Rehab & Corr.* (1991), 60 Ohio St.3d 107, 111.

The parties fully briefed this issue for the court. Upon consideration of the briefs, the court granted defendant a trial by jury and set forth its basis in an opinion dated August 17, 1999. Even assuming the court is incorrect in its legal reasoning, it is difficult to imagine how a panel of eight jurors is prejudicial to plaintiff. Finally, the issue is preserved in the record for appellate review and does not constitute grounds for a new trial.

CONCLUSION

There is substantial, competent, and credible evidence to support the jury's verdict for the State of Ohio. In light of all of the foregoing facts and principles of law, defendant respectfully requests that plaintiff's motion for judgment notwithstanding the verdict and motion for a new trial be denied.

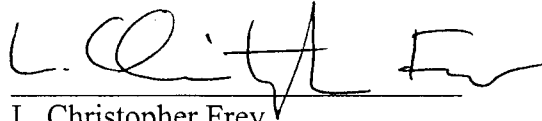
Respectfully submitted,

WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR


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CERTIFICATE OF SERVICE

A copy of the foregoing State's Brief in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict , or in the Alternative, Motion for a New Trial, was mailed via ordinary US mail to Terry Gilbert, Counsel for Plaintiff, 1370 Ontario Street, Suite 1700, Cleveland, Ohio 44113, this 8 day of May, 2000.



L. Christopher Frey
Assistant Prosecutor